Supreme Court, U.S.
FILED

No. 99 336

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

BRUCE GILLAND,

Petitioner,

versus

TOGO WEST, JR., SECRETARY,
DEPARTMENT OF THE ARMY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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QESTIONS PRESENTED

1. Is summary judgment appropriate in a discrimination where there are questions regarding the qualifications of competing candidates for a position?

2. How is the term pretext to be defined in a merit system framework?

3. Must criteria used to evaluate individuals for promotion in a merit system or hire be published and must they be demonstrated to relate to the job in question?

LIST OF PARTIES

The Parties herein:

Bruce Gilland ..... Plaintiff

Togo West, Jr., Secretary,
Department of the Army ..... Defendant

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No.

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October Term, 1999

BRUCE GILLAND, - - - - - - - *Petitioner,*

versus

TOGO WEST, JR., SECRETARY OF THE ARMY, - - - - - - - - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

OPINIONS BELOW

The opinion sought to be reviewed is that of the Sixth Circuit Court of Appeals in Bruce Gilland vs. Secretary, Togowest, Jr., Department of the Army, 1999 (Circuit Court Number 98-5855), entered May 27, 1999. The decision of the Trial Court is not officially reported.

JURISDICTION

This is a case arising under the Age Discrimination in Employment Act, 29 USC §633(a).

The Notice of Appeal was filed June 22, 1998.

The jurisdiction of the Supreme Court of the United States is conferred by Rule 19 of the Supreme Court of the United States of America and 28 USC §2101.

STATUTE

The statute primary to this case is the Age Discrimination in Employment Act, 29 USC §633(a).

STATEMENT OF THE CASE

A. Overview

1. Plaintiff is a Caucasian male who has retired from federal service and resides in Kentucky. Prior to his retirement, the Plaintiff was employed as a civilian guidance counselor, GS-9, for the Army in the Republic of Korea. (Verified Complaint ¶ 5).

2. On February 26, 1993, the U. S. Army Recruiting Command, Fort Knox, Kentucky, announced that it was hiring for a vacant Education Services Specialist position, GS-7, developmental GS-11. (See: Merit Promotion Vacancy Announcement, Exhibit "A" of Plaintiff's Response to Defendant's Motion to Dismiss, in Part, and for Summary Judgment).

3. On March 15,1993, the Plaintiff applied for the Education Services Specialist position by submitting his application materials from Korea. (RE #10, Defendant's Exhibit 2 to Defendant's Motion to Dismiss in Part, and for Summary Judgment, Application for Federal Employment (SF-171) and all attachments).

4. The selecting official, Rebecca L. Brittain, Chief, Education Division, U. S. Army Recruiting Command, Fort Knox, appointed a three member panel to review all the applications and create an order of merit list to assist her in making the selection. (RE #10, Defendant's Exhibit 9, Investigation Transcript, pg. 5).

5. Ms. Brittain changed the selection criteria from the published criteria, meaning that the candidates were evaluated against criteria other than the KSA criteria on the position announcement. (RE #12, Statement of Rebecca Brittain, pg. 68-70, Exhibit "B" of Plaintiff's Response to Defendant's Motion to Dismiss, in Part, and for Summary Judgment). The secretly developed criteria were:

a. Education Services Specialist (ESS) Experience: Counseling or other working experience in Army/AF/Navy Education center or High School/College (secondary/postsecondary) at GS-05 Level and above (or its equivalent) — 2 points for each year (within last five years).

b. Other ESS Experience: Teachers or other work experience in training at GS-05 level and above (or its equivalent) (within last five years) — 2 points for each year.

c. Completed Practicum/Internship in Counseling/Guidance — 10 points.

d. Education: 1 point for BA/BS; 2 points for MA/MS in any field; 4 point for MA/MS in Education/Counseling; 5 points for degree completion beyond MA/MS.

e. Performance Appraisal: 10 points for current Exceptional rating; 5 points for current Highly Successful rating. (RE #12, Evaluation Sheets, pg. 40-54, Exhibit "C" of Plaintiff's Response to Defendant's Motion to Dismiss, in Part, and for Summary Judgment).

6. The Defendant has failed to show that the criteria are job related.

7. A total of ten candidates were qualified and referred to the rating panel for evaluation.

8. The rating panel met on May 20, 1993, and rated all ten applicants. (RE #10, Defendant's Exhibit 3, Refer-

ral list with two referral and selection requests (DA Form 2600)).

9. The top five candidates, which included the Plaintiff, were rated using the secret criteria by the panel and referred to the selecting official for consideration. (RE #10, Defendant's Exhibit 4 and 5, Evaluation sheets prepared by rating panel).

10. The selecting official, Ms. Brittain, selected Rebecca Crittenden, for the position. (RE #10, Defendant's Exhibit 6, Referral and Selection Request (DA Form 2600)).

11. On June 18, 1993, the Plaintiff initiated an informal Equal Employment Opportunity (EEO) complaint. In response to a request for clarification, Plaintiff stated that his failure to be selected for the Educational Services Specialist position was an act of reprisal for prior EEO activity. (RE #10, Defendant's Exhibit 7, EEO Complaint letters dated June 18, 1993 and July 13, 1993 and Army correspondence of June 28, 1993).

12. On November 20, 1993, the Plaintiff filed a formal EEO complaint alleging that he was not selected for the Education Services Specialist position because of a reprisal for prior EEO activity. He claimed that a less qualified person was selected. (RE #10, Defendant's Exhibit 8, Formal Complaint of Discrimination).

13. On February 2, 1994, an investigator from the Department of Defense Office of Complaints Investigation (DODOCI), conducted a hearing in which she took sworn testimony from the selecting official and all three rating panel members Additionally, the DODOCI investigator took the sworn testimony of Richard Keys, an education services specialist. (RE #10, Defendant's Exhibit 9 DODOCI Investigation Transcript).

14. The DODOCI investigation produced the following sworn testimony:

a. Rebecca L. Brittain, Chief Education Division, U. S. Army Recruiting Command, stated that she changed the criteria. (RE #12, Statement of Rebecca Brittain, pg. 68-70, Exhibit "B" of Plaintiff's Response to Defendant's Motion to Dismiss, in Part, and for Summary Judgment). She further testified that she was aware of Mr. Gilland's prior EEO activities (RE #12, Statement of Rebecca Brittain, pg. 10, Exhibit "B" of Plaintiff's Response to Defendant's Motion to Dismiss, in Part, and for Summary Judgment).

b. William J. Kunisch, Education Services Specialist, stated that he was aware of Mr. Gilland's prior EEO activity and that he was a member of the panel (RE #12, Statement of William J. Kunisch, pg. 85-87, Exhibit "D" of Plaintiff's Response to Defendant's Motion to Dismiss, in Part, and for Summary Judgment).

c. Richard F. Keys, Education Services Officer, Fort Knox, stated that he had nothing to do with the selection, but since he is the career program manager for Fort Knox, the position filled is similar to positions that he has on the installation. As an outside person to the selection process he was asked to review the applications of the top five candidates and rate each one, demonstrating the bias of the panel and the effect of this changed criteria. He found that Plaintiff had been unjustly rated in his experience. (RE #12, Statement of Richard F. Keys, pg. 112-116, Exhibit "E" of Plaintiff's Response to Defendant's Motion to Dismiss, in Part, and for Summary Judgment).

15. Plaintiff timely followed the administrative proceedings and exhausted his administrative remedies.

B. BACKGROUND

The agency advertised a position of Educational Services Specialist, GS 1740-07 developmental GS-11 vacancy

announcement dated March 29, 1993, vacancy announcement No. USAARMC 21-93. The Plaintiff made a timely application and was referred to the selecting official as "Best Qualified" candidate for the position. The Plaintiff had filed prior EEO complaints. The Plaintiff was not selected in preference to a candidate with less experience and qualifications. The selecting official and one of the members of the selection panel were aware of the Title VII activities of the Plaintiff, thereby giving rise to an inference of discrimination in subject case.

The agency in its vacancy announcement identified the High Quality Performance Criteria or the essential Knowledge, Skills and Abilities (KSA's) required to successfully perform in the announced position. The KSA's were subsequently incorporated in the vacancy announcement. (See: Merit Promotion Vacancy Announcement, Exhibit "A" of Plaintiff's Response to Defendant's Motion to Dismiss, in Part, and for Summary Judgment). The identified KSA's were:

a. Ability to communicate orally and in writing;
b. Ability to analyze and evaluate;
c. Ability to plan and organize;
d. Knowledge of secondary and past secondary education and accreditation programs.
e. Ability to research, interpret and apply regulation guidelines;
f. Ability to interact with other.

ARGUMENT

A. Mr. Gilland Has Demonstrated That His Non-selection Was Motivated By Retaliatory Intent

Mr. Gilland alleges that he was discriminated against in reprisal for his prior EEO activities. A Plaintiff may establish a prima facie case of retaliation under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3, by proving:

> (1) that Plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his . . . civil rights was known by the Defendant; (3) that, thereafter, the Defendant took an employment action adverse to the Plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.

Christopher v. *Stouder Memorial Hospital*, 936 F.2d 870, 877 (6th Cir.), cert. denied, 502 U.S. 1013 (1991); *Lacy* v. *Bentsen*, 859 F.Supp. 1039, 1042-43 (E.D. Mich. 1993), aff'd, 25 F.3d 1049 (6th Cir. 1994); *Bacon* v. *Secretary of the Air Force*, 785 F.Supp. 1255, 1264-65 (S.D. Ohio 1991), aff'd, 7 F.3d 232 (6th Cir. 1993), cert. denied, 119 S.Ct. 1568 (1994).

This analysis is applicable to the ADEA, which at 29 U.S.C. § 623(d), prohibits private employers from discrimination against individuals for assisting in an ADEA proceeding. *Hollis* v. *Fleetguard, Inc.*, 668 F.Supp. 631, 637 (M.D. Tenn. 1987), aff'd, 848 F.2d 191 (6th Cir. 1988). The EEOC, which at 29 U.S.C. § 633a(b), is given authority to issue regulations to enforce the prohibition against discrimination in federal employment, prohibits, at 29 C.F.R. § 1614.101(b) (994), federal employers from retaliation for participating in administrative proceedings under the Title VII. The cases alleging retaliation under Section 1614.101(b) have adopted the Title VII analysis of the burden of proof. *Parnell* v. *Stone*, 793 F.Supp. 742, 746 (E.D. Mich. 1992), aff'd, 12 F.3d 213 (6th Cir. 1993).

Mr. Gilland meets the first prong of the prima facie case, in that he filed prior EEO complaints. The Defendant admits that the selecting official and one of the selecting panel were aware of Mr. Gilland's prior EEO activity. (RE #10, Defendant's Exhibit 9, pg. 3-18, pg. 22-35).

B. The Selection

The applications were forwarded to the selecting official, who changed the selection criteria after she reviewed

the applications. The selecting official was aware of Mr. Gilland and his prior EEO complaints and in fact was aware of or should have been aware of Mr. Gilland's prior traning and skills. The selecting official then hand picked a selection panel and had them rate the candidates on the changed criteria. The new criteria were developed after the selecting official reviewed the applications and after she was aware that Mr. Gilland had applied for the position. (RE #12, Statement of Rebecca Brittain, pg. 68-70, Exhibit "B" of Plaintiff's Response to Defendant's Motion to Dismiss, in Part, and for Summary Judgment). The selecting official knew Mr. Gilland and was aware of his prior EEO activity (RE #12, Statement of Rebecca Brittain, pg. 10, Exhibit "B" of Plaintiff's Response to Defendant's Motion to Dismiss, in Part, and for Summary Judgment). The Plaintiff and the other applicants were never rated against the KSA's.

Using this secret criteria, the panel ranked the Selectee first and the Plaintiff fifth. The selecting official looked at the panel input and made the selection.

Once the Plaintiff has established a prima facie case, the burden shifts to the Defendant to articulate a legitimate, non-discriminatory reason for its employment action. *Cox* v. *Kentucky Department of Transportation*, 53 F.3d 146, 150 (6th Cir. 1995); *Manzer* v. *Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1082 (6th Cir. 1994); *Cooley* v. *Carmike Cinemas, Inc.*, 25 F.3d 1325, 1329 (6th Cir. 1994).

The selecting official states that she looked over the applicants, changed the selection criteria based upon the applications and then referred the list to her subordinates for evaluation and recommendations. The subordinates rated the candidates based upon the secret new criteria developed by the selecting official rather than upon the KSA's identified in the job announcement. The credentials

of the Plaintiff were not examined against the announced KSA's for the job. The selection matrix developed by the subordinates must be carefully examined. The use of completed practicum/internship in counseling/guidance is not job related. Neither the announced KSA's nor the job description for the position reference counseling. The job analysis worksheet for each KSA, prepared prior to the announcement, make no reference to counseling. There is no basis in the record for use of counseling in screening candidates. Counseling experience might be a relevant evaluation factor in some jobs if it was shown that counseling experience was necessary to perform the critical elements of the job in question without undue interruption or loss of productivity beyond that normally expected of new but fully qualified employee. Such was not shown in this instance. If such a case could be made, it should have been identified in the job analysis and placed in the vacancy announcement. This was not done in this case. Had counseling been identified as a pre-requisite for the job, candidates would have known to address that issue in their application.

Evidence of intent may be shown when a federal agency does not follow its own regulations and procedures. (SEE: *Johnson* v. *Lehman*, 679 F.2d 918 (1982)). In this case, the Army published Merit Promotion and Placement C3, USAARMC Req. 690-5(3)(c) (RE #12, Merit Promotion and Placement, Exhibit "G" of Plaintiff's Response to Defendant's Motion to Dismiss, in Part, and for Summary Judgment) which clearly requires that selection be due from the KSA's. The agency did not follow its own regulation in this case.

No creditable argument can be made that the Plaintiff would not have been selected, absent the discriminatory factors in the selection process. The Plaintiff was never evaluated against the published KSA's for this job. Plain-

tiff was never notified by the Agency that he should set forth counseling training and experience in his application because it was not listed in the KSA's. The Trial Court seemed not to understand or address the importance of this issue. The Trial Court on Page 2 of its Memorandum Opinion states:

> "The most contentious aspect of the new criteria was the requirement of a completed practicum. Plaintiff either had not completed an internship or had failed to inform the Defendant of his practicum experience."

That statement by the Court demonstrates the difficulty created by changing selection criteria after the applications have been accepted.

First, the modification of hiring criteria after the opportunity to review the applications provides the selecting official or panel the opportunity to modify criteria in such a way as to tally the criteria to the application of a favored candidate, or in the case of Mr. Gilland, to tally the criteria in such as way as to dictate the selection.

Second, the use of unpublished criteria creates a situation where a candidate may actually possess knowledge, skills and abilities in the area of the new criteria but, may not have included such information, or may not have provided details on such criteria because it was not published on the vacancy announcement as a critical element of the job.

In this case the panel rated the best qualified candidates based upon unpublished criteria. These criteria were not the posted criteria for the job. These criteria were developed not in a vacuum but, were developed by the selecting official after she reviewed the applications and after she knew that Mr. Gilland had applied for the position. The agency made no attempt to relate the added selection criteria to the job.

Assuming arguendo that the employer has met its burden of articulating a legitimate, non-discriminatory reason for failing to hire the Plaintiff, "the burden shifts back to the Plaintiff to prove by a preponderance of the evidence that the reason proffered by the employer was not its true reason but merely a pretext for discrimination." *Cooley* v. *Carmike Cinemas, Inc.*, 25 F.3d 1325, 1329 (6th Cir. 1994); *Roush* v. *KFC Management Co.*, 10 F.3d 392, 396 (6th Cir. 1993), cert. denied, 115 S. Ct. 56 (1994); *Hawley* v. *Dresser Industries, Inc.*, 958 F.2d 720, 724 (6th Cir. 1992). The Plaintiff may prove pretext either directly or circumstantially. See: *Kline* v. *TVA*, 128 F.3d 337 (6th Cir., 1997).

Pretext is simply proven by the criteria used. It is further proven in that the criteria used were not the published criteria. The employer did not follow its own rules and therefore there is a presumption of bias. The employer's claim may have more credence if the selecting official considered and rejected Gilland based upon the published criteria. Instead, she modified the criteria after she reviewed Gilland's application. Further, the selecting official, Rebecca L. Brittain and the panel member who knew of Gilland's prior EEO activity have given contradicting statements through the EEO process. (RE #12, Merit Promotion and Placement, Exhibit "G" of Plaintiff's Response to Defendant's Motion to Dismiss, in Part, and for Summary Judgment).

C. The Case Herein Is Not Appropriate for Summary Judgment

Gilland met his burden of proving a prima facie case of reprisal. The question then becomes first whether the agency has demonstrated a legitimate business purpose in its decision not to hire Gilland and second, whether that reason is pretextual.

The role of the judge at summary judgment is not to weigh the evidence but, to determine whether there is genu-

ine fact issue for trial. See: *Talley* v. *Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241 (6th Cir., 1995). Credibility determinations, weighing of evidence, and drawing of legitimate inferences from facts are those of the jury, not the judge. All justified inferences are to be drawn in favor of the nonmoving party. See: *Morales* v. *American Honda Motor Co.*, 71 F.3d 531 (6th Cir., 1995); *Agrister Fin. Corp. vs. Van Sicle*, 967 F.2d 233 (6th Cir., 1992); *United States* v. *O'Black*, 788 F.2d 1433, 1435 (10th Cir., 1986).

It is the job of the Court to determine whether there is a genuine issue of material fact. The court should determine whether there is sufficient evidence favoring the nonmovant for a finder of fact to return a verdict in that party's favor. See: *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Turner and Bosseau vs. Nationwide Mutual Insurance Co.*, 989 F.Supp. 1359 (D.Kan 1997). It is not up to the court on a summary judgment motion to determine which side is likely to win.

In the case before the court, there were fact questions regarding the qualifications of the individual awarded the job as compared to those of Gilland. There were material questions and inferences to be drawn regarding the unannounced changes to the job requirement and the failure of the agency to follow its own rules. There are inferences to be drawn from the fact that the agency never validated the modified job requirements, nor did it show that those revised standards were job related. All of these inferences should be drawn in favor of Gilland.

Where, as here, there is a question as to the qualifications of a candidate for a job, summary judgment may not be appropriate. See: *Kline* v. *TVA, supra.*

CONCLUSION

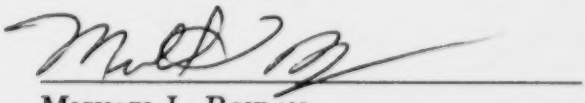
For the foregoing reasons, the Summary Judgment entered herein must be set aside and the case must be remanded for trial.

REASONS FOR GRANTING THE WRIT

This case should be reviewed because it will further help define the term pretext pursuant to *McDonnell Douglass Corp. vs. Green,* 411 U.S. 792, 802 (1973) and *St. Mary's Home Center* v. *Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 2749 (1993). Pretext should be explained within the Merit System framework, where there are rigid rules regarding job announcements. There are few, if any definitive cases relating to the merit system framework. The definitions of pretext have not been well defined in this area.

Within the merit system framework can an unannounced change in criteria, developed after the selecting official views the applications demonstrate pretext?

Respectfully Submitted,



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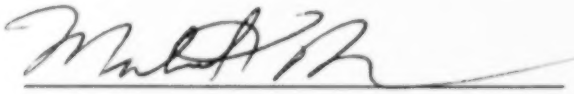
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed this 23 day of August, 1999, to Regina S. Edwards, Assistant U. S. Attorney, Bank of Louisville Building, 510 West Broadway, 10th Floor, Louisville, Kentucky 40202; and Jennifer Payton, Assistant District Counsel, U. S. Army Corps of Engineers, P.O. Box 59, Louisville, Kentucky 40201-0059.



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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3':96CV-803-H

BRUCE GILLAND, - - - - - - - - - *Plaintiff*

v.

TOGO WEST, JR., SECRETARY OF THE ARMY - - - - - - - - - *Defendant*

MEMORANDUM OPINION—
Entered May 22, 1998

On March 15, 1993, Plaintiff, a federal services employee, applied for a position with the Army as Education Services Specialist in Fort Knox, Kentucky. Plaintiff did not get the job, and filed this suit claiming racial discrimination and retaliation for prior Equal Employment Opportunity complaints. Plaintiff also sought punitive damages. Defendant moves for dismissal of the discrimination and punitive damages claims, and summary judgment on the retaliation claim. Plaintiff concedes that his discrimination claim and request for punitive damages should be dismissed.

Plaintiff applied for the job after seeing a vacancy announcement which stated that the Essential Knowledge, Skills and Abilities (KSA's) required are ability to communicate, ability to analyze and evaluate, ability to plan and organize, and knowledge of secondary and post secondary education and accreditation programs. Defendant received quite a few applications and based upon the KSA's, selected the top ten to refer to a panel for evaluation.

The person in charge of the selections was Ms. Brittain. She has stated under oath that when she unexpectedly received so many highly qualified applicants she chose additional criteria for the job, such as experience as services specialist, other experience as a trainer, practicum/internship in counseling, education and performance appraisal. Ms. Brittain also selected the panelists who would evaluate each of the qualified candidates. The panelists would assign the candidate points based upon each of the new requirements. For instance, a candidate would receive one point for having a BA/BS and 4 points for a MA/MS in education. Plaintiff's total score from the panelists ranked him fifth. Ms. Brittain selected the person ranked first. There were forty-six points between Plaintiff and the person ranked first, while there were only fourteen points between first and second.

The most contentious aspect of the new criteria was the requirement of a completed practicum. Plaintiff either had not completed an internship or failed to inform the Defendant of his practicum experience. Regardless, Plaintiffs complaint is that Ms. Brittain changed the requirements to considerations unrelated to the job so that Plaintiff would not get the job. Her alleged motive for doing this is his history of filing EEO complaints. Moreover, at least one of the panelists knew Plaintiff and knew that he had a history of EEO complaints. All individuals involved in the selection process have testified under oath that Plaintiffs history did not influence their decisions.

To establish a prima facie case of reprisal, Plaintiff must show that (1) he engaged in activity protected by Title VII; (2) he was the subject of adverse employment action; and (3) there is a causal link between the protected activity and the adverse employment action. *See Jackson v. RKO Bottlers of Toledo, Inc.,* 743 F.2d 370, 375 (6th Cir. 1984). If he accomplishes this, Defendant has the burden of showing a legitirnate non-retaliatory explanation. *See id.* at 377. Defendant claims that Plaintiff's case fails because there is no causal link and because Defendant has

offered a non-discriminatory reason which Plaintiff cannot show is pretextual. It says that Plainfiff simply was not the most qualified individual for the job.

Plaintiff says that Defendant was bound to follow only the KSA's appearing in the vacancy announcement and could not go outside them to make a decision. The KSA's in that announcement are fairly general qualifications. Ms. Brittain states that the KSA's were used in the initial screening process to determine which applicants would be referred to the next level of consideration. In fact, the vacancy announcement states that "determination of referable candidates" will be based on the KSA's. Ms. Brittain explained that she developed additional criteria because she had not expected so many highly qualified applicants to apply for such a low level position. Once this occurred, she appropriately resorted to a 'neutral' panel and asked them to evaluate the candidates based on the additional requirements.

Plaintiff contests the new criteria as not being related to the job, but several panelists and a worker in a related field testified that the additional considerations were helpful and that a practicum is almost essential to the job. Furthermore, the announcement itself states that once a person is selected, he or she would be required to complete a practicum in order to be promoted to a GS-11. Obviously, a completed practicum would be an asset for any candidate.

Plaintiff contends that he was more qualified than the person selected, but offers no explanation of how he was more qualified. All panelists ranked the same person first. Plaintiff ranked no higher than fifth by any panelist. Even the person who knew nothing about Plaintiff's EEO complaints did not rank Plaintiff first. Plaintiff does not even explain how he was the most qualified when evaluated under the KSA's. There were ten candidates, including Plaintiff, who made it past the threshold requirements. Based on education and experience, the evidence is that all of the panel thought someone else was more qualified than

Plaintiff. No evidence suggests that the reasons given or the process used infer a pretext for the purpose of discriminating against Plaintiff

The Court will enter an order consistent with this Memorandum Opinion.

/s/ John G. Heyburn II
John G. Heyburn II
Judge, U.S. District Court

Entered: May 22, 1998

cc: Counselof record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3 :96CV-803-H

BRUCE GILLAND, - - - - - - - - *Plaintiff*

v.

TOGO WEST, JR., SECRETARY OF THE ARMY - - - - - - - - - *Defendant*

ORDER—Entered May 22, 1998

Defendant has moved for dismissal of the discrimination claim and punitive damages claim and for summary judgment on the retaliation claim. After thoroughly reviewing the memoranda and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendant's motions are sustained and Plaintiff's claims are DISMISSED with prejudice.

This is a final and appealable order.

This 22nd day of May, 1998.

/s/ John G. Heyburn II
John G. Heyburn II
Judge, U.S. District Court

Entered: May 22, 1998

cc: Counselof record

APPENDIX B

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-5855

BRUCE GILLAND, - - - - *Plaintiff-Appellant,*

v.

TOGO WEST, JR., SECRETARY OF THE ARMY - - - - - *Defendant-Appellee.*

On Appeal from the United States District Court for the Western District of Kentucky

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MEMORANDUM OPINION—
Entered May 22, 1998

BEFORE: NORRIS and COLE, Circuit Judges, and SARGUS, District Judge.*

PER CURIAM. Plaintiff, Bruce Gilland, appeals from an order of the district court granting summary judgment to defendant, the Secretary of the Department of the Army, on his claim that his failure to be selected for ajob vacancy was the product of discrimination prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* Specifically, he contended that defendant denied him the position in retaliation for his having in the past filed complaints against defendant with the Equal Employment Opportunities Commission.

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*The Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

Having had the benefit of oral argument and having carefully considered the record on appeal, the briefs of the parties, and the applicable law, we are not persuaded that the district court erred in granting summary judgment to defendant.

Because the reasoning supporting judgment for defendant has been articulated by the district court the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court is **affirmed** upon the reasoning employed by that court in its Memorandum Opinion entered on May 22, 1998.

APPENDIX C

[EXCERPTS FROM 28 USC §2101]

TIME FOR APPEAL—S.C.T.

28 § 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under Section 1253 of this title, holding unconstitutional in whole or in part, by Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of the district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within thirty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by rules of the Supreme Court.

(June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104; Dec. 6, 1983, Pub.L. 98—209, § 10(b), 97 Stat. 1406; June 27, 1988, Pub.L. 100—352, § 102 Stat. 663.)

APPENDIX D

[EXCERPTS FROM 29 USC §633a]

AGE DISCRIMINATION

29 § 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment

Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this sections may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such

legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such actio. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in

Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

(Pub.L. 90—202, § 15, as added Pub.L. 93—259, § 28(b)(2), Apr. 8, 1974, 88 Stat. 74, and amended Pub.L. 95—256, § 5(a), (e), Apr. 6, 1978, 92 Stat. 191; 1978 Reorg. Plan No. 1, eff. Jan. 1, 1979, § 2, 43 F.R. 19807, 92 Stat. 3781.)